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No. 90-1150

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD J. WILLY,

Petitioner,

versus

THE COASTAL CORPORATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER DONALD J. WILLY'S REPLY TO BRIEF IN OPPOSITION

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The Court's intervening decision in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___ (No. 89-1500, 1991 WL 21369, February 26, 1991), coupled with Coastal's misplaced reliance on the Rules Enabling Act, 28 U.S.C. § 2071 (Brief in Opposition at pp. 8-9), demonstrates convincingly that the Fifth Circuit's decision, sustaining the award of

attorney's fees to litigants and attorneys wrongly invoking federal subject matter jurisdiction, violates the Constitution of the United States.[1]

At least since *Cooke v. United States*, 267 U.S. 517 (1925), and more probably since *United States v. Hudson*, 7 Cranch 32 (1812), no rational person could doubt that the courts of the United States possess, implicitly and as an essential attribute of the federal judicial power conferred by Article III, an inherent right of self-protection. It is not specifically mentioned anywhere in the Constitution because it does not need to be. A federal court of necessity must be able to shield itself against actual or imminently threatened disruption of its proceedings or obstruction of its orders. The inherent federal criminal contempt power, arising from a principle of institutional self-preservation, does not depend for its exercise on subject matter jurisdiction. Because Willy was not adjudged in criminal contempt of the district court, he has never had occasion to argue otherwise.

Thus, Judge Easterbrook's fanciful example of the federal trial judge punched in the nose[2] has nothing to do

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[1] Coastal's opposition, like the Fifth Circuit's opinion, confuses the Rule 11 sanctioning power with the inherent power to award attorney's fees for bad-faith litigation. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). See, *e.g.*, Brief in Opposition at p. 5 (asserting "inherent power of a federal court to control its own proceedings *by imposing Rule 11 sanctions*" (emphasis added). If Rule 11 is applicable, "inherent power" need not be invoked at all. Conversely, if Rule 11 is inapplicable, it is also irrelevant, since a federal court possessing an "inherent power" obviously needs no rule of procedure in order to exercise it.

[2] *Szabo Food Service, Inc v. Canteen Corp.*, 823 F.2d 1073, 1079 (7 Cir. 1987), cited in Brief in Opposition at p. 8.

with whether Article III permits the award of attorney's fees to parties who wrongly invoke federal subject matter jurisdiction. Federal judges who are assaulted during the performance of their judicial duties, or who have the decorum of their courts disrupted by firearms, cameras, or recording devices surreptitiously smuggled in (Brief in Opposition at p. 9, n. 4), or whose *status quo* orders are willfully disregarded by litigants while the court attempts to sift through difficult evidentiary, jurisdictional, or substantive issues,[3] are inherently empowered to deal with such calculated misconduct by means of criminal contempt sanctions.

But the inherent power to impose a criminal contempt penalty is neither the constitutional nor the functional equivalent of a power to enter a money judgment favoring one of the litigants. If a federal court turns out to lack Article III jurisdiction over a pending case, it simply does not require, as a necessary attribute of its judicial power, the additional authority to award attorney's fees to those who wrongly brought the controversy there. On the contrary, one of the principal justifications for imposing sanctions against litigants at all, as *Business Guides* recognizes, is enforcement of "the duty they owe the court system to conserve its resources and avoid unnecessary proceedings" (slip op. at 7). Awarding money to attorneys and parties who mistakenly invoke federal jurisdiction does nothing whatever to promote that objective but rather effectively undermines it. Accordingly, recognizing a supposed constitutional

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[3] *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988); *Maness v. Meyers*, 419 U.S. 449 (1975); *United States v. United Mine Workers*, 330 U.S. 258 (1947).

basis for imposing attorney's fees in such circumstances is no more "necessary" than finding an equivalent power to inflict the sanction of civil contempt.[4]

Coastal's invocation of the Rules Enabling Act (at p. 9) is totally misplaced. As the Court observed in *Business Guides*, there is "little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure . . ." and therefore falls squarely within the rule-making authority conferred by § 2071 (slip op. at 12). But that is certainly no basis for claiming that any equivalent rule could or should govern practice or procedure in cases over which neither Article III nor Congress has ever granted to a federal court the constitutional competence to act in the first place. The implicit premise of Rule 11 in particular, and of the Rules Enabling Act and the Federal Rules of Civil Procedure in general, is that they will be applied and enforced in controversies that are within the power of federal courts to consider and decide. No rules of practice are needed for cases beyond federal subject matter jurisdiction. There need only be an order of dismissal or remand.

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[4] Coastal's effort to distinguish the award of attorney's fees as a sanction in this case from the Eleventh Circuit's refusal to sustain the sanction of dismissal with prejudice on the merits in equivalent circumstances (at pp. 7-8) is unpersuasive. If a federal court is "inherently empowered" to award attorney's fees as a sanction, for purported misconduct arising from its consideration of the merits of a case over which it lacks subject matter jurisdiction, there is simply no principled reason why it should not also be able to dismiss the case with prejudice (as a sanction against a plaintiff) or strike the answer and enter a default judgment (as a sanction against a defendant).

Finally, Coastal's implication that certiorari should be denied because this case is aberrational and fact-specific is not persuasive. Refusing panel and *en banc* rehearing, the Fifth Circuit has authoritatively given to United States district courts in three states a pervasive, virtually unrestricted power to award attorney's fees in cases over which neither Article III of the Constitution nor Congress ever conferred the authority to act. That holding, with its disastrous implications for traditional principles of federalism, comity, and judicial self-restraint, is deserving of review by this Court.

The petition for certiorari should be granted.

Respectfully submitted,

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